

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 2001B005

DISMISSAL ORDER AND INITIAL DECISION

CORNELIUS JOHNSON,

Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES,
DIVISION OF YOUTH CORRECTIONS,
SPRING CREEK YOUTH SERVICES CENTER,

Respondent.

THIS MATTER is before the Board on Respondent's Motion to Dismiss. Complainant has not filed a response. Having reviewed the motion, the file, the applicable law, and being sufficiently advised in the premises, the Administrative Law Judge finds and orders as follows.

1. Complainant filed his appeal on June 28, 2000, alleging discrimination on the basis of race.
2. The case was referred to the Colorado Civil Rights Division ("Division") for investigation.
3. On August 24, 2001, the Division issued its Opinion of No Probable Cause, which was sent to Complainant at his updated and correct address.
4. On August 29, 2001, the State Personnel Board referred this case to the Division of Administrative Hearings for hearing. In addition, this referral notified Complainant that he had ten days to file an appeal of the No Probable Cause opinion. This notification also stated, "If the employee fails to file an appeal or petition, the discrimination claim is considered abandoned and dismissed, and the matter will proceed without consideration of the issue of discrimination. See Board Rule R-8-37. This referral was not sent to Complainant's proper address because Complainant had not yet notified the Board of his change in address.

5. Complainant received a copy of the August 29 referral and notice of appeal rights concerning the No Probable Cause determination on September 24, 2001. (Per Complainant's statement on the record at setting conference on October 9, 2001. See October 9, 2001 Procedural Order; Notice to Set and Notice of Prehearing Conference.)
6. Complainant therefore had ten days from September 24, 2001 within which to appeal the No Probable Cause determination of the Division.
7. The ten-day deadline for appealing the No Probable Cause determination has passed, and Complainant has not appealed that finding. Therefore, the discrimination claim is considered abandoned and dismissed, and the matter will proceed without consideration of the issue of discrimination.
8. Complainant was a probationary employee at the time of his termination. As a probationary employee, he is entitled to "all the same rights to a hearing as a certified employee; except that such probationary employee shall not have the right to a hearing to review any disciplinary action . . . while a probationary employee." Section 24-50-125(5), C.R.S.; Williams v. Colorado Dept. of Corrections, 926 P.2d 110, 112 (Colo. App. 1996).
9. A review of the termination letter in this case reveals that Complainant's termination was disciplinary in nature. It was based purely on performance problems.
10. Therefore, the Board lacks subject matter jurisdiction to hear this case.

WHEREFORE, Respondent's motion to dismiss is granted and this case is dismissed with prejudice.

DATED this 23rd day
of October, 2001, at
Denver, Colorado.

Mary S. McClatchey
Administrative Law Judge
1120 Lincoln St., Suite 1400
Denver, CO 80203

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. The notice of appeal must be received by the Board no later than the thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is \$50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages

in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 2 inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF MAILING

This is to certify that on this _____ day of **October, 2001**, I placed true copies of the **DISMISSAL ORDER AND INITIAL DECISION** in the United States mail, postage prepaid, addressed as follows:

Cornelius Johnson
P.O. Box 472186
Aurora, Colorado 80047

and in the interagency mail, to:

Melissa Mequi
Assistant Attorney General
Employment Section
1525 Sherman Street, 5th Floor
Denver, Colorado 80203

Andrea Woods